Filed 3/22/10 P. v. Raybould CA3

**NOT TO BE PUBLISHED**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>MATTHEW STEVEN RAYBOULD,<br><br>Defendant and Respondent. | C057327<br><br>(Super. Ct. No. 62-069090) |

The People appeal from an order of the Placer County Superior Court sustaining defendant Matthew Steven Raybould's demurrer to a felony complaint. The court dismissed the complaint and refused to reinstate it. We affirm the trial court's order of dismissal.

## FACTS AND PROCEEDINGS

For purposes of clarity, we will separately set forth the procedural history of the two complaints that we discuss below.

*Complaint No. 62-045322*

On May 25, 2005, the People filed a misdemeanor complaint, No. 62-045322, of which we take judicial notice (Evid. Code § 452, subd. (d))(hereafter the misdemeanor complaint). The misdemeanor complaint charged defendant with five offenses, two of which were for deterring an executive officer in the performance of his or her duties (Pen. Code, § 69; unspecified statutory references that follow are to the Penal Code), which is a "wobbler" offense.

Trial began, but, on March 5, 2007, Judge James Garbolino granted defendant's *Wheeler* motion (*People v. Wheeler* (1978) 22 Cal.3d 258), and declared a mistrial, finding that during jury selection the prosecutor had exercised his peremptory challenges in a racially biased manner.

On March 6, 2007, a new trial began. During the course of that trial, Judge Garbolino found that the prosecutor violated the court's pretrial order that there be no reference by witnesses or counsel to an allegation that defendant had, in an unrelated incident, exposed himself in an indecent manner. Judge Garbolino granted defendant's motion for a mistrial and dismissed the case in furtherance of justice. (§ 1385.)

On April 27, 2007, defendant filed a petition for a finding of factual innocence and for the sealing and destruction of his arrest records (§ 851.8, subd. (c)) in the now-dismissed misdemeanor case.

On June 12, 2007, Judge Garbolino granted the petition for a finding of factual innocence.

On July 27, 2007, the People filed their notice of appeal in the Appellate Department of the Placer County Superior Court purporting to appeal from Judge Garbolino's order dated June 28, 2007, denying reconsideration of his order of June 12 and from his order to seal and destroy the record of arrest dated July 13, 2007.

On April 14, 2008, the Appellate Department of the Placer County Superior Court filed its decision on the People's appeal finding that the appeal should properly have been from the June 12 order on the petition for a finding of factual innocence and not from the order on the motion for reconsideration or from the order to seal and destroy the arrest records. The court thus found the notice of appeal was not timely and dismissed the appeal. Defendant has requested that we take judicial notice of the Appellate Department's order following decision. We grant that request.

Thereafter, on May 21, 2008, the appellate department denied the People's motion for reconsideration and application for certification to the Court of Appeal. On June 5, 2008, the Court of Appeal, Third Appellate District, denied the People's petition to transfer the matter to the Court of Appeal.

On June 10, 2008, the remittitur issued and Judge Garbolino's June 12, 2007 order granting the petition for a finding of factual innocence became final.

*Complaint No. 62-069090*

On April 12, 2007, the People filed felony complaint No. 62-069090 (hereafter the felony complaint), charging the same offenses that had been charged in the misdemeanor complaint No. 62-045322, only this time the counts charging a violation of section 69, deterring an officer, were charged as felonies.

On June 27, 2007, defendant filed a demurrer to the felony complaint, arguing that prosecution was barred by, inter alia, section 1387, double jeopardy, and Judge Garbolino's finding of factual innocence in the misdemeanor case.

On July 17, 2007, Judge Frances Kearney conducted a hearing on defendant's demurrer to the felony complaint. After taking judicial notice of Judge Garbolino's finding of factual innocence, Judge Kearney concluded that Judge Garbolino had dismissed the misdemeanor complaint for insufficiency of the evidence. Judge Kearney granted the demurrer without leave to amend and dismissed the felony complaint.

On July 31, 2007, the People filed a motion to reinstate the felony complaint. (§ 871.5.) On September 28, 2007, by written ruling, Judge Colleen Nichols denied the motion, finding that the motion was premature because the People's appeal of the finding of factual innocence was still pending and finding that the motion could be "reopened" if the finding of factual innocence was set aside.

On October 25, the People filed the instant appeal, seeking reversal of Judge Kearney's order sustaining defendant's

demurrer and dismissing the felony complaint, and of Judge Nichols's denial of their motion to reinstate the felony complaint.

## DISCUSSION

"'The function of a demurrer is to test the sufficiency of the [complaint] by raising questions of law. [Citation.] The [complaint] must be given a reasonable interpretation and read as a whole with its parts considered in their context. [Citation.] A general demurrer admits the truth of all material factual allegations of the [complaint]; plaintiff's ability to prove the allegations, or the possible difficulty in making such proof, does not concern the reviewing court. [Citation.] "As a reviewing court we are not bound by the construction placed by the trial court on the pleadings but must make our own independent judgment thereon, even as to matters not expressly ruled upon by the trial court." [Citation.]' (*Aragon-Haas* v. *Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 238-239.) Thus, we independently review this legal issue based on undisputed facts." (*People v. Keating* (1993) 21 Cal.App.4th 145, 150-151.)

Defendant demurred to the complaint pursuant to section 1004, subdivision 5. That provision states:

"The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof: [¶] . . . [¶] 5. That it contains . . . [a] legal bar to the prosecution."

In this matter, the question arises as to whether we can consider in deciding this appeal, in addition to that which is set forth within the four corners of the complaint, Judge Garbolino's order on the petition for a finding of factual innocence in case number 62-045322 (the Order). We hold that we can.

In arguing that neither this court (nor the trial court) can properly take judicial notice of the order, the People argue that we are prevented from doing so by this court's opinion in *Shortridge v. Municipal Court* (1984) 151 Cal.App.3d 611 (*Shortridge*) [overruled on other grounds in *In re Manuel L.* (1994) 7 Cal.4th 229, 238, fn. 5] and by section 851.8, subdivision (i). We reject the People's arguments.

In *Shortridge*, the defendant was charged by misdemeanor complaint with being an accessory to a felony. (§ 32.) He demurred to the complaint on the ground "that facts which are judicially noticeable establish that the principal was a 15-year-old minor at the time of the offense and was therefore legally incapable of committing a felony." (*Shortridge, supra,* 151 Cal.App.3d at p. 614.) The demurrer was overruled and he appealed, raising the same issues. As to the age issue, we concluded that the trial court had erred in taking "judicial notice of the principal's age." (*Id.* at p. 616; see also *id.* at pp. 615-616.) It was within this context that we made the following statement now relied upon by the People: "In criminal cases . . . a demurrer to an accusatory pleading is limited to defects which 'appear upon the face' of the pleading. (Pen.

Code, § 1004.) Since a demurrer raises a question of law as to the sufficiency of the accusatory pleading and only tests those defects appearing on its face [citations], it follows that a trial court may not judicially notice matters for the purpose of ruling upon a demurrer in a criminal case." (*Id.* at p. 616.)

The People argue that *Shortridge* precludes a trial court, when ruling on a demurrer, from taking judicial notice of matters which do not appear on the face of the pleading. The People read *Shortridge* too broadly.

While the quoted portion of our opinion in *Shortridge* supports the People's argument, it must be read in the context of the facts before the *Shortridge* court. Thus, the fact the trial court judicially noticed in *Shortridge* was the age of the person who committed the crime and the judicial notice was based on "records of the juvenile court in a different proceeding." (*Shortridge, supra,* 151 Cal.App.3d at p. 616, fn. 5.) The information in those records was--apparently without dispute--hearsay and the truth of the pertinent fact, the age of the person who committed the crime, could not be based on hearsay statements even if they were part of a court record or file. *Shortridge* stands for no more.

As we explained in *People v. Tolbert* (1986) 176 Cal.App.3d 685 (*Tolbert*), "For purposes of demurrer, . . . matters which may be judicially noticed may be said to appear constructively on the face of the pleading. . . . [¶] Judicial notice may be taken of the records of a court of this state. [Citations.] . . . Ordinarily a court may notice the existence of another

court's findings of fact and conclusions of law in support of a judgment, because they are conclusive and uncontrovertible in character and not reasonably subject to dispute. But judicial notice cannot be taken of hearsay allegations as being true . . . just because they are part of a court record or file [citations]." (*Id.* at pp. 689-690.) Stated yet another way, "A trial court may properly take judicial notice of the records of any court of record of any state of the United States. . . . 'There exists a mistaken notion that this means taking judicial notice of the existence of facts asserted in *every document* of a court file, including pleadings and affidavits. However, a court *cannot* take judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file. A court may take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.'" (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.)

Thus, at the very least, we can judicially notice Judge Garbolino's order and the findings of fact and conclusions of law stated therein. We may consider the evidence upon which Judge Garbolino relied even if, arguably, we are prevented from considering the truth of that evidence. For instance, as set forth in detail below, the charges in case no. 62-045322 were based in part on a claim that defendant had kicked at a "canine officer" that is, a police dog. We may judicially notice that Judge Garbolino's order rested in part on a finding that the dog

initiated contact with the defendant and that there was no evidence whatsoever that the dog was in any way harmed or struck or abused, even if we are precluded (and we do not so hold) from considering the truth of those factual findings.

The People argue that, in ruling on the demurrer, the trial court was, and we are, prohibited by the provisions of Penal Code section 851.8 from taking judicial notice of and considering Judge Garbolino's finding of factual innocence. Subdivision (i) of section 851.8 provides: "Any finding that an arrestee is factually innocent pursuant to subdivision (a), (b), (c), (d), or (e) shall not be admissible as evidence in any action." We recognize that, in California, an "action" is defined as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22) "Evidence" is "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence of a fact." (Evid. Code, § 140.)

Unfortunately, the available legislative history of section 851.8, sheds no light, indeed, says not a word, about the Legislature's intent in adding subdivision (i) to the statute.

Normally, "[a] court should not look beyond the plain meaning of a statute when its language is clear and unambiguous and there is no need to resolve uncertainties through

interpretation." (*People v. Frank* (1985) 163 Cal.App.3d 939, 944.)

But, "[w]hen uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* [(1987) 43 Cal.3d 1379], 1387.) In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purposes, not absurd consequences. (*People v. Jeffers* [(1987) 43 Cal.3d 984, 997; *In re Head* (1986) 42 Cal.3d 223, 232].) "'"[W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted."' (*In re Eric J.* (1979) 25 Cal.3d 522, 537.)" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165-1166.)

"[O]ur task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. [Citations.]" (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 388.)

"'"'It is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the

Legislature did not intend.'"' [Citations.]" (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 290.)

We do not know what the Legislature had in mind in enacting section 851.8, subdivision (i). Perhaps it had in mind a situation where there had been a finding of factual innocence, but new evidence led to the filing of new charges and the Legislature did not want the finding of factual innocence under outdated evidence to be admissible, and no doubt confusing, in the follow-on prosecution. Or perhaps it had in mind a situation where a person arrested or prosecuted brings a civil action for false arrest or brings a civil action for malicious prosecution against a private party and the Legislature did not want the outcome of such actions to be influenced by a previous finding of factual innocence by a judge.

What we can say is that applying the literal meaning of section 851.8, subdivision (i) in the circumstances before us would defeat the Legislature's obvious intent in enacting section 851.8 and would lead to an absurd result. In general, the Legislature enacted the statute to unburden individuals who are the subject of unproven or unprovable criminal charges from the specter of criminal wrongdoing. To read the statute literally would lead to the absurd result that, after a finding of factual innocence, the prosecuting authorities are free to refile the very same charges, thinly disguised, (a matter that we will address in more detail momentarily) based on the very same evidence that led the court earlier to find that "no

reasonable cause exist[ed] to believe that the arrestee committed the offense for which the arrest was made" (§ 851.8, subd. (b)) or upon which the prosecution rested. To read the statute literally would be to completely negate its intent and, in turn, the Legislature's intent in enacting it. Given the unique procedural circumstances presently before us, we hold that consideration of Judge Garbolino's finding of factual innocence is not barred by the provisions of section 851.8, subdivision (i).

Finally, the People argue petitions for a finding of factual innocence are case specific and that we may not consider anything that occurred in case No. 62-045322 because this is a new prosecution under a new case number. It is not; it is the same prosecution under a new number, the only difference being that the People have upped the ante by charging one of the original offenses in this "new" prosecution as a felony. To credit that argument would result in the same absurd result we have discussed above. We reject this contention.

Having concluded that both the trial court and this court can take judicial notice of Judge Garbolino's orders in case No. 62-045322, we turn to the merits of the demurrer.

As noted earlier, defendant demurred to the complaint arguing that there is a legal bar to the prosecution. We agree.

The unusual nature of these proceedings requires us to go beyond a simple listing of the procedural events that we have set forth at the beginning of this opinion. Because we consider Judge Garbolino's order on defendant's petition for a finding of

factual innocence in case number 62-045322 essentially dispositive of this appeal, it is helpful to quote Judge Garbolino's recitation of the events preceding that order in some detail.

"On March 6, 2007 this court dismissed the above-entitled case pursuant to Penal Code Section 1385(a). On April 12, 2007, the People filed Case No. 62-69090, charging the defendant with identical charges originally contained in the misdemeanor complaint filed herein, excepting that the counts alleging violations of Calif. Pen. Code § 69 have been charged as felonies in 62-69090 instead of misdemeanors as charged in the complaint in this case, 62-045322. On April 27, 2007, the defendant filed a notice of petition and petition for determination of factual innocence and for corresponding orders for the sealing and destruction of records. The petition was opposed by the people, and the matter was argued and submitted on May 14, 2007.

"II. DISCUSSION

"A. Previous Orders declaring Mistrials and Dismissal. On March 6, 2007, this court dismissed the above-entitled action in its entirety. This dismissal took place after the jury had been sworn, opening statements made to the jury, and witnesses examined. In proceedings outside the presence of the jury the court granted motions for mistrial and for dismissal with the following comments:

"THE COURT: Motion for mistrial is granted. The motion to dismiss under 1385 is granted.

"Pursuant to 1385 I am required to phrase my reasons on the record in writing before the close of the day as to why that motion was granted. I am going to do that for the court reporter and I'm going to ask the court reporter to transcribe that today that that can be transcribed in the Court's minutes.

"This Court granted a *Wheeler* motion yesterday and summoned a new jury today to try this case. The *Wheeler* motion was granted because of the prosecutor's apparent exclusion of persons of similar racial characteristics from the jury.

"Today the Court heard evidence which violated the Court's in limine rulings concerning mention of an incident involving indecent exposure occurring at and near the same time and place as the Defendant's arrest. The Court specifically excluded reference to that by the prosecutor or any other witnesses. The first witness on the stand made two references to that. The Court sustained objections to that and motions to strike and the prosecutor made a third reference to that. Under the circumstances, the Court finds that there is prosecutorial misconduct and the Court cannot ignore the repeated instances of that. The sanction that the Court deserves--that the Court deems is appropriate is dismissal of this case under 1385 of the Penal Code for the reasons that further prosecution of this matter would be subject to the same concerns that the Court has over the conduct of the prosecution in this case. For that reason the Court now enters this dismissal.

"The minute order on the same date reflects as follows:

"The Court hereby orders the above-entitled case dismissed pursuant to Penal Code Section 1385. Counsel for the defendant moved for a dismissal, but the statute does not permit such a motion. Instead, the court deems counsel's motion to dismiss as an invitation to the court to exercise its discretion pursuant to Section 1385. For the reasons stated below, the court exercises its discretion and orders the case against the defendant dismissed in its entirety in furtherance of justice.

"This trial has been twice aborted. The first attempt to select a jury resulted in a mistrial when this Court granted a *Wheeler* motion (*People v. Wheeler* [,*supra*,] 22 Cal.3d [at p.] 148) yesterday and summoned a new jury today to try this case. The *Wheeler* motion was granted because of the prosecutor's systematic exclusion of persons of similar racial characteristics from the jury (Chinese).

"The case was reset for jury trial before a new jury commencing this date. After the jury was selected, the prosecutor elicited evidence which violated the Court's in limine rulings concerning mention of an incident involving indecent exposure occurring at and near the same time and place as the Defendant's arrest in this case. The reference was prohibited because the defendant was clad only in his underwear at the time of arrest, and the correlation between the indecent exposure incident and the defendant was fraught with potential prejudice--this despite the fact that it was conceded that there was absolutely no relationship between the defendant's conduct and the incident involving another person committing an act of

indecent exposure. Before trial, the court made orders specifically excluding any reference to the indecent exposure incident by the prosecutor or any prosecution witnesses.

"The prosecution's second witness, Placer County Sergeant David Powers made two references to the indecent exposure incident. The Court sustained objections to those references and granted defense motions to strike. After those two incidents, the prosecutor initiated a specific question referencing the indecent exposure incident. The prosecutor's question was aimed at clarifying the fact that the indecent exposure incident did not involve the defendant in any way. Despite his lack of malicious intention, the prosecutor nevertheless violated the court's order not to make reference to the incident.

"Outside the presence of the jury the prosecutor unequivocally represented to the court, and later offered to testify to the same, that he did, on two occasions after lunch today, inform Sergeant Powers that he, Powers, was not to mention the indecent exposure investigation at all. He was quite clear about his having specifically warned Powers not to make reference to the subject of the court's pre-trial order. The court called Sgt. Powers back into court, outside the presence of the jury. The court questioned Sgt. Powers whether the prosecutor spoke with him about not mentioning the indecent exposure incident. Sgt. Powers specifically denied having any conversation with the prosecutor about avoiding reference to the indecent exposure incident. Under questioning from the

Prosecutor, the Sergeant maintained that no such conversation occurred. The Sergeant could not have been mistaken.

"A mistrial of this case is inevitable, due to the potential for prejudice against the defendant and the lack of any probative value of the testimony and references which violated this court's order. Under the circumstances, the Court finds that there is prosecutorial misconduct on two separate occasions dealing with this case. Under the circumstances the court has no confidence that this case has been prepared and handled in a manner consistent with the expected standards of fairness and objectivity. Further continuance or trial of this case would subject the defendant to unnecessary expenses of re-arranging expert witnesses and the further expense of trial. It is for all of the above reasons that the court has now, on its own motion, ordered the case dismissed in the interests of justice pursuant to California Penal Code § 1385."

"B. The Defendant's Evidence. The defendant's petition was made pursuant to California Penal Code § 851.8(c). The motion is supported by a (1) memorandum of points and authorities, (2) the declaration of Michael W. Jones, along with (3) numerous exhibits, reports, and references to documents in the file. Additionally counsel requested the court to take judicial notice of the entire file.

"The Defendant's evidence shows the following: (1) The defendant was charged by misdemeanor complaint with the five charges set forth above. (2) The defense attempted to preserve all documentary evidence, reports, photographs, videos, and all

other documentation surrounding the arrest of the defendant in this case, and ultimately obtained a discovery order requiring the People to provide the requested information to the defense. (3) The defendant's family took photographs of the defendant's injuries three days after his arrest. Those photographs showed numerous animal bite marks, and numerous bruises and abrasions on his stomach, sides of his torso, back of the legs, calf, face, thighs, and buttocks. (4) The report and investigation done by Ernest Burwell establishes that the use of the canine to apprehend defendant was inappropriate, constituting an excessive use of force. The report states that [¶] '[defendant] was charged for assaulting a police dog, resisting arrest, and running away from the police. Both Sgt. Bergstrom and Officer Nowicki said in their reports [defendant] did not know that they were there, he was unaware of the police following him, and had a 1000 yard stare. With that information [defendant] should not have been charged with any crimes. [¶] 'In my opinion this incident was nothing more than [defendant] being used for canine training by the Roseville Police Department. [¶] For nearly three minutes and seventeen seconds [defendant] was being either bit by a police canine, struck by police batons, kneed, or pepper sprayed.'

"Mr. Burwell has over 20 years' experience as a canine handler for the Los Angeles County Sheriff's Office, trainer, and Certified Canine Evaluator for the California Peace Officers Standards and Training (POST).

"(5) The defendant provided frame by frame video of the attack by the canine on the defendant, which shows that the dog was not kicked or injured by the defendant. (6) The defense cited to a statement related to defense counsel by the deputy District Attorney handling the case that he was pursuing the charges against the defendant in order to protect the 'City and the cops.' When another court hearing motions in this case inquired whether such a statement was made, the Deputy District Attorney added language to the statement which tended to neutralize its meaning.

"In essence, the Defense view of this case is as follows: The incident prompting the defendant's arrest took place on July 30, 2004, but that the defendant had committed no crimes; Defendant asserts that the use of force to detain him was excessive and unauthorized, starting with the use of the canine to bite and apprehend him, and ending with being beaten, kicked, and pepper sprayed; The case languished for over 10 months before a complaint was filed by the District Attorney's office, and that filing was motivated by pressure from the Roseville Police Department; Despite early and persistent attempts to preserve physical evidence before charges were ever filed, police photographs taken of the defendant's physical injuries on the night of the arrest were finally said to have been incapable of being developed due to a camera malfunction; Without explanation as to the reasons for the delay, that malfunction was not disclosed or explained until more than two years after the arrest; Defendant maintains that he committed no crimes; The

charges relating to the defendant appearing on the property of a private citizen in the area were dismissed by the prosecution pursuant to Penal Code 1385 well in advance of the trial in this case, as evidenced by an amended misdemeanor complaint being filed which reflected only four charges; Finally, defendant cites to the instances of prosecutorial misconduct which formed the basis for this court's dismissal of all charges, including the orders and transcripts which reflect the proceedings.

"C. The People's Response. The People have not presented any evidence in their opposition nor have they requested the court to take additional evidence. The opposition filed in this case by the People consists of a memorandum containing a brief recitation of the facts as viewed by the People, and argument on various issues of law. Attached to the People's memorandum are a copy of the court's minute order dismissing the case on March 6, 2007, and a copy of Judge Couzens' ruling on the defense previous motion to dismiss based upon various grounds. Other than an invitation at the hearing on this motion to consider a declaration by the City Attorney of Roseville relating to the subject matter of footnote 2, *supra*, which could have been filed should the court find it relevant, the People made no attempt to place any evidence before this court.

"D. The sufficiency of the motion to declare the defendant factually innocent. The crux of defendant's argument begins with the acknowledgement that the people had previously dismissed the charge of disorderly conduct: loitering or prowling on private property in violation of 647(h) which was

contained in Count V of the misdemeanor complaint filed on May 25, 2005. Trial proceeded on an amended misdemeanor complaint which charged in Counts I and II violations of Penal Code § 69 (relating to officers Nowicki and Bergstrom), Count III, a violation of Penal Code § 148a (relating to officer Nowicki), and Count IV, willfully harming a peace officer's animal in violation of Penal Code § 600a. Before the court dismissed the case, two witnesses testified--Mr. Brian Bonhoff and Sergeant Powers of the Placer County Sheriff's Department. The testimony adduced at trial showed that the defendant was discovered by Sgt. Powers who was investigating another incident. Powers saw the defendant jogging toward him wearing only a pair of boxer shorts. Powers ordered the defendant to come toward him, and the defendant turned and ran away from Powers. Powers lost track of the defendant when the defendant jumped over a fence and hedge into someone's back yard. The evidence showed that the defendant had entered the yard of Mr. Bonhoff. Bonhoff saw the defendant in his back yard illuminated by the searchlight of a helicopter. Sgt. Powers ordered the defendant to get on the ground, but the defendant began running away from the house. Powers subsequently came upon the scene where the defendant had been placed into custody by Officer Nowicki, Sgt. Bergstrom and the canine. There were no other witnesses who testified at the trial.

"Other evidence shows that thereafter the defendant ran from Bonhoff's back yard and was subsequently discovered by Officer Nowicki who released his canine when the defendant

failed to stop or to acknowledge the presence of the officer. Defendant argues the absence of any substantial evidence that the defendant willfully harmed the officer's dog, based upon the presentation of photographic evidence that the only contact between the defendant and the dog was at the dog's initiative. The defendant argues his innocence on the remaining three charges based upon the fact that he was authorized to resist a detention (and subsequent arrest) which was occasioned with the unlawful application of force, thus vitiating the charges of resisting an executive officer and resisting arrest.

"The evidence is unequivocal in showing that the defendant is factually innocent of Count IV, willfully harming a police officer's animal. The photographs provided show that the dog initiated contact with the defendant. There is no evidence whatsoever that the dog was in any way harmed or struck or abused.

"The remaining charges, Penal Code §§ 69 and 148, are the subject of the report of Mr. Burwell. The evidence before the court is uncontradicted in showing the unjustified and excessive use of force by the officers/animal preceded any actions by the defendant which might have amounted to a violation of Penal Code §§ 69 or 148." (Bolding & fns. omitted.)

Put simply, Judge Garbolino found that, considering all of the evidence the defendant and the People offered on the question, defendant was, in fact, innocent of charges which are, in all important respects, the same as those the People seek to prosecute here. On this record, there is no new evidence beyond

that which was the subject of the petition brought under section 851.8. As noted, the charges are the same. It is apparent therefore that there is a legal bar to defendant's prosecution in this matter; he has already been found factually innocent of the charges.

The demurrer in case No. 62-069090 was properly sustained.

## DISPOSITION

Judge Kearney's orders sustaining the demurrer and dismissing the felony complaint are affirmed.

HULL, J.

We concur:

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.